No. 84-686

In The

Supreme Court of the United States

October Term, 1984

FIZER CORPORATION t/a The GO GO RAMA,

Petitioner,

vs.

JOHN F. VASSALLO, JR., Director, New Jersey Division of Alcoholic Beverage Control,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Third Circuit misinterpreted prior Supreme Court decisions.

2. Whether fact-finding by an administrative agency or the State Legislature is required before a person's rights may be violated by arbitrary regulations of a state liquor authority pursuant to the Twenty-first Amendment.

3. Whether the Third Circuit exceeded its authority by applying its subjective views rather than address the issue before it.

4. Whether any and all municipal or state regulations are voidable where they are legally "arbitrary and capricious."

5. Whether the Third Circuit erred in failing to require the State of New Jersey to justify its challenged regulations.

LIST OF INTERESTED PARTIES

Counsel of record for petitioner Fizer Corporation certifies and represents, in order that the Justices of this Court may evaluate possible disqualification or recusal, that the parties in the United States Court of Appeals for the Third Circuit were:

1. Fizer Corporation, t/a the Go Go Rama, a corporation of the State of New Jersey.

2. John F. Vassallo, Jr., Director, New Jersey Division of Alcohol and Beverage Control.

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No.

In The

Supreme Court of the United States

October Term, 1984

FIZER CORPORATION t/a The GO GO RAMA,

Petitioner,

vs.

JOHN F. VASSALLO, JR., Director, New Jersey Division of Alcoholic Beverage Control,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey; the opinion of the United States Court of Appeals for the Third Circuit affirming dismissal of this action by the District Court and the order of the Court of Appeals denying a petition for rehearing and a petition for rehearing *en banc* constitute the record below and are set forth in the appendix to this petition.

JURISDICTION

Jurisdiction of the District Court was asserted in a complaint which alleged violation of petitioner's rights under the First, Fifth, Fourteenth and Twenty-first amendments to the United States Constitution. Jurisdiction was also asserted under 28 U.S.C. §1983 which grants jurisdiction to the District Court of all civil rights litigation.

A petition for certiorari will be filed within 90 (ninety) days of the entry of the order denying rehearing in accordance with 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This action concerns the conflicting rights of the State of New Jersey to enforce regulations governing semi-nude dancing in establishments serving liquor pursuant to unlimited authority of the State granted by the Twenty-first Amendment and that of the tavern owner which employs "go-go" dancers whose behavior was not in violation of any State criminal law, but held to be on violation of a regulation arbitrarily and capriciously issued by the Division of Alcohol Beverage Control.

Petitioner's establishment was raided and closed by agents of the New Jersey Division of Alcohol Beverage Control although the entertainers were routinely acquitted of any charges by the criminal courts.

Petitioner consistently fought the charges against his tavern on the grounds that the regulations were vague, overreaching and unconstitutional. All efforts by the petitioner, and other tavern owners similarly charged, to prevent the suspension of their liquor licenses through exhaustion of administrative proceedings and resort to state or federal courts have been uniformly unsuccessful.

Knowing the fruitlessness of attacking liquor regulations after alleged violations, petitioner has brought a direct attack on the questioned regulations on the ground that the regulation was "arbitrary and capricious" and sought to enjoin enforcement of the regulation until fact-finding hearings be held to determine whether the regulation was warranted.

Both the District Court and the Court of Appeals refused to address petitioner's arguments preferring to inject their own view of "proper" behavior. However, what may constitute "proper" behavior was never nor is it now an issue before the Court. Petitioner seeks review by this Court since its civil rights have been violated by an arbitrary regulation having no basis in law. While petitioner has not been charged with a specific crime, its liquor license has been revoked.

REASON FOR GRANTING THE WRIT

Petitioner has relied on the decisions of this Court in *California v. LaRue,* 409 U.S. 109 (1972) and *N.Y. State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981) for the proposition that liquor regulations are immune from attack under the Twenty-first Amendment provided there was a *legislative basis and fact-finding to support the regulation.*

The court below ignored the mandate of *LaRue* and *Bellanca* and held that any regulation concerning the dispensing of liquor was immune from attack.

Since petitioner believes that the court below has misinterpreted the decisions of this Court, this writ should be granted so that this Court may clarify the extent of restrictions on the State in the area of liquor regulations under the due process clause and the broad authority vested in the States under the Twenty-first Amendment.

I.

Without public hearings a liquor regulation was issued which by law is arbitrary and capricious.

The pertinent regulations, N.J.A.C. regulation 13:2-23.6(a)(1) provides:

> "No licensees shall engage in or allow, permit or suffer in or upon the licensed premises . . . (1) any lewdness or immoral activity."

While the definition of lewdness or immoral activity is nowhere contained in the regulations, the attitude of the Division is clearly set forth in A.B.C. Bulletin No. 1778, Item No. 5 (December 27, 1967) reprinted in A.B.C. Bulletin 1805, Item No. 1 wherein the then Director, Joseph P. Lordi, set down the policy for New Jersey in licensed liquor establishments:

> "In passing, however, I wish emphatically to advise all licensees, the so-called 'topless' female employees whether with pasties described by the division agents or the larger ones described by the licensee's witnesses, will not be tolerated on licensed premises in this State."

Since the State throughout these proceedings has never attempted to find a fact-finding basis for the regulation and since the Bulletin clearly reflects a *personal viewpoint* of the Director, the regulation, for the purposes of this petition must be deemed "arbitrary and capricious" as a matter of law. The legal definition of "arbitrary and capricious" is found in *O'Boyle v. Coe,* 155 F. Supp. 581; *O'Beine v. Overholzer,* 193 F. Supp. 653; *Schad v. Mt. Ephraim,* 452 U S. 161, 68 L. Ed. 2d 671, 101 S. Ct. 2242 (1981) all of which support the proposition that there must be a *finding of*

factual basis for a regulation by an administrative agency, not just the *whim* of the administrator.

The court below disregarded these decisions (Appendix, 6a-7a) holding:

> "We must now inquire whether the regulation passes constitutional muster. The Supreme Court has upheld state regulations prohibiting sexual entertainments in licensed establishments. In *California v. LaRue* it stated that 'wide latitude as to the choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment.' 409 U.S. at 116. The Court further noted that the state agency regulating the sale of liquor was not 'limited to . . . dealing with the problem it confronted within the limits of our decisions as to obscenity. . . .' *Id.* In *New York State Liquor Authority v. Bellanca,* the Court reaffirmed the breadth of the state's powers under the twenty-first amendment and stated: 'The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs. . . . Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment.' 452 U.S. at 717-18.
>
> We agree with the district court that the teachings of the Supreme Court in *Bellanca* and *LaRue* confer something more than the normal state authority over public welfare and morals in

> enforcing the state's broad police power in regulating licensed premises. We also agree with the district court that the regulation, far from being arbitrary and capricious, does bear a rational relationship to the protection of public welfare and morals."

Thus, the court below made its own determination that the proscribed activities were offensive and therefore, the regulation valid.

Thus, the court below reversed the process of judicial review by injecting its personal views as to the "so-called" condemned behavior and then ignored the authorities to justify its conclusion that the regulation was valid.

Petitioner submits that the court below disregarded this Court's decision in *California v. LaRue,* 409 U.S. 109 (1972) where at page 110 this Court stated:

> "Concerned with the progression in a few years' time from 'topless' dancers to 'bottomless' dancers and other forms of 'live entertainment' in bars and nightclubs that it licensed, the Department heard a number of witnesses on this subject at public hearings held prior to the promulgation of the rules. The majority opinion of the District Court described the testimony in these words:
>
> > 'Law enforcement agencies, counsel and owners of licensed premises and investigators for the Department testified. The story that unfolded was a sordid one, primarily relating to sexual conduct between dancers and customers . . .' 326 F. Supp. 348, 352."

Further, at page 115:

> "A common element in the regulations struck down by the District Court appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court, and mindful of the principle that in legislative rulemaking the agency may reason from the particular to the general, Assigned Car Cases, 274 U.S. 564, 583 (1927), we do not think it can be said that the Department's conclusion in this respect was an irrational one."

Likewise, in *New York State Liquor Authority v. Bellanca* at 69 L. Ed. 361, this Court found it essential that there be a legislative determination in support of a liquor regulation.

Petitioner submits that this Court recognizes the broad authority of the States to regulate the dispensing of liquor by reason of the Twenty-first Amendment, but held that the States' authority was still restricted by the due process clause and any regulation must be by legislative directive or *the result of fact-finding by the administrative agency.*

If such be the sense of this Court's rulings in *California v. LaRue* and *N.Y. State Liquor Authority v. Bellanca,* then this Court should grant petitioner's writ to redress the error committed by the court below.

CONCLUSION

This petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted to compel compliance with prior decisions of this Court.

Respectfully submitted,

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**Counsel of Record*

ORDER OF COURT OF APPEALS DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5850

FIZER CORPORATION, t/a The GO GO Rama, a corporation of the State of New Jersey

vs.

JOHN F. VASSALLO, JR., Director, New Jersey Division of Alcoholic Beverage Control

FIZER CORPORATION, t/a GO GO Rama,

Appellant

(D.N.J. Civ. No. 83-2842)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and HUYETT, *District Judge*.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges

---

* Honorable Daniel H. Huyett, 3rd, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Order

of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

s/ Aldisert
Chief Judge

DATED: JUL 24 1984

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5850

FIZER CORPORATION, t/a The GO GO Rama, a corporation of the State of New Jersey

vs.

JOHN F. VASSALLO, JR., Director New Jersey Division of Alcoholic Beverage Control

FIZER CORPORATION, t/a GO GO Rama,

Appellant

Appeal from the United States District Court for the District of New Jersey - Trenton
(D.C. Civil No. 83-2842)
District Judge: Honorable Anne E. Thompson

Submitted Under Third Circuit Rule 12(6)
June 21, 1984
Before: ALDISERT, *Chief Judge*, HIGGINBOTHAM, *Circuit Judge*, and HUYETT, *District Judge*.*

(Filed June 22, 1984)

---

* Honorable Daniel H. Huyett, 3rd, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Opinion

ALDISERT, *Chief Judge.*

Fizer Corporation, operator of a tavern known as The Go-Go Rama in Old Bridge, New Jersey, appeals from a dismissal of its complaint which sought to enjoin the Director of the New Jersey Division of Alcoholic Beverage Control from enforcing a Division regulation prohibiting lewd and immoral activities on the premises of liquor licensees. The regulation, N.J.A.C. 13:2-23.6(a)(1), provides:

> No licensee shall engage in or allow, permit or suffer in or upon the licensed premises . . . (1) any lewdness or immoral activity . . . .

It is not controverted that between October 1981 and January 1983 The Go Go Rama featured activities by nude female entertainers. As stated by appellant:

> The only issue presented to this court is whether the District Court erred in accepting a regulation of the New Jersey Division of Alcoholic Beverage Control (precluding semi-nude dancing) which was arbitrary and capricious and without justification.

Brief for Appellant at iii. In its complaint below, appellant asserted that this regulation violated the first, fourteenth, and twenty-first amendments both as written and as applied "to the plaintiff's enterprise."

Because the present proceeding is but an additional chapter in a long saga of challenges brought by this appellant in both the state and federal courts, *see* Brief for Appellee at 2-15, the district court "with hesitancy" denied the appellee's motion to dismiss on the basis of res adjudicata or collateral estoppel. It

nevertheless dismissed the complaint, on appellee's motion, for failure to state a claim upon which relief could be granted.

The district court relied on *New York State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972). Although the matter came before the district court on the pleadings, plaintiff incorporated in his complaint the state proceedings which resulted in a temporary suspension of his license. It therefore is appropriate to examine those proceedings to determine whether the regulation, either as drafted or as applied to appellant, was unconstitutional on the grounds that it was "arbitrary and capricious and without justification." We will examine the complaint to determine whether the activity which took place in appellant's bar constituted "lewdness or immoral activity."

In the administrative proceeding the parties stipulated to the following: On October 16, 1981, two undercover inspectors of the New Jersey State Police observed Tami Patricia Levine perform on the dance stage of the licensed premises. During her performance she removed the top portion of her two piece costume, replaced it with a transparent shawl, at various times lifting the shawl completely exposing her breasts, "shaking them repeatedly in exchange for tips from patrons among whom she circulated." After receiving one tip in particular she returned to the stage and sucked on her left nipple. Several times during her performance, she laid down on the stage, spread her legs and exposed and rubbed her vagina, "while the patrons cheered loudly." In exchange for a $2.00 tip from a patron she bent over and exposed her anal area and rubbed her fingers on her vagina. Before completing her routine she replaced her shawl with a black teeshirt on the front of which was imprinted "I give good head."

Ms. Levine was replaced by another dancer identified as Marilyn P. Rossin. On numerous occasions Ms. Rossin exposed her breasts to the patrons, and at one point in her performance, after she had received a $1.00 tip, she tore a hole through the center of the dollar bill and inserted her left nipple inside the hole, attaching the dollar bill to her breast. On several occasions she laid down on the stage and spread her legs exposing her vagina. Ms. Levine then performed again, pulling down the top portion of her costume and exposing her breasts on several occasions. While kneeling on the stage in one instance, she simulated sexual intercourse. Subsequently, still kneeling, she exposed her anal area to the patronage, pulling the lower portion of her costume aside and spreading her buttocks.

We have no difficulty in describing the foregoing activity — more gynecological or proctologic than terpsichorean — as "lewd."

We must now inquire whether the regulation passes constitutional muster. The Supreme Court has upheld state regulations prohibiting sexual entertainments in licensed establishments. In *California v. LaRue* it stated that "wide latitude as to the choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment." 409 U.S. at 116. The Court further noted that the state agency regulating the sale of liquor was not "limited to . . . dealing with the problem it confronted within the limits of our decisions as to obscenity . . . ." *Id.* In *New York State Liquor Authority v. Bellanco*, the Court reaffirmed the breadth of the state's powers under the twenty-first amendment and stated: "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs.

Opinion

. . . Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment." 452 U.S. at 717-18.

We agree with the district court that the teachings of the Supreme Court in *Bellanco* and *LaRue* confer something more than the normal state authority over public welfare and morals in enforcing the state's broad police power in regulating licensed premises. We also agree with the district court that the regulation, far from being arbitrary and capricious, does bear a rational relationship to the protection of public welfare and morals.

We have carefully considered all of the contentions of the appellant and will affirm the judgment of the district court in all respects.

TO THE CLERK:

Please file the foregoing opinion.

s/ Aldisert
Chief Judge

OPINION OF UNITED STATES DISTRICT COURT FOR DISTRICT OF NEW JERSEY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 83-2842

Transcript of Proceedings

Trenton, New Jersey
October 24, 1983

FIZER CORPORATION, et al

Plaintiffs,

vs.

JOHN F. VACCALLO, JR.,

Defendant,

B E F O R E

The Honorable Anne E. Thompson, U.S.D.J.

Appearances:

MESSRS. HEUSER & MC DONALD
BY: EUGENE J. MC DONALD, ESQ.
For the Plaintiffs

Opinion

IRWIN I. KIMMELMAN, ATTORNEY GENERAL
BY: CHRISTINE HEFFNER STEINBERG, Deputy Attorney General
For the Defendant

THE COURT: Before the Court today is plaintiff Fizer Corporation's ("Plaintiff") application for a preliminary injunction. Defendant John Vassallo, Director of the New Jersey Division of Alcoholic Beverage Control ("Defendant") has moved to dismiss the complaint or, in the alternative, to consolidate it with Civil Action No. 83-838, *Fizer Corp. v. Kimmelman and Vassallo.*

The Fizer Corporation operates a tavern in Old Bridge, N.J. called the Go Go Rama. Plaintiff holds a license to serve liquor at the Go Go Rama. On October 16, 1981, two Go Go Rama dancers were arrested and charged with violation of a state criminal statute prohibiting lewdness (NJSA 2C:14-4). The two were convicted by the Old Bridge Municipal Court on February 11, 1982. The convictions were reversed by the Superior Court of New Jersey Law Division following a trial *de novo.*

In addition, a disciplinary hearing was brought against Plaintiff by the Division of Alcoholic Beverage Control, charging violations of N.J.A.C. 13:2-23.6 ("the regulation"), which provides that no licensee will allow lewdness or immoral activity on the licensed premises. In a careful opinion, the New Jersey Office of Administrative Law noted that a New Jersey liquor license is not a property right, and concluded that the regulation is constitutionally valid as within the rule making authority of the Director of the Division of Alcoholic Beverage Control. The Administrative Law Judge also concluded that the regulation is not unconstitutionally vague. He went on to conclude that the regulation and judicial interpretations of it set forth proper and

adequate standards for determining when conduct is "lewd" under the regulation, and that the activities permitted at the Go Go Rama were lewd. The Administrative Law Judge recommended a 60-day suspension of Plaintiff's Liquor license ("the Order").

Plaintiff filed certain objections to the Administrative Law Judge's Order with the Director of the Division of Alcoholic Beverage Control. Specifically, Plaintiff asserted that the regulation was constitutionally invalid, unconstitutionally vague, that the standards used to judge "lewd behavior" under the regulation were invalid, and that the actions of the dancers were not lewd, but were expressions of free speech. The Director affirmed the Administrative Law Judge's findings and conclusions, and ordered the 60 day suspension to run from March 7, 1983 until May 6, 1983.

Plaintiff appealed the Order, conclusions and findings to the Superior Court of New Jersey Appellate Division, and moved for a stay of the enforcement of the Order pending disposition of the appeal. On March 3, 1983, the Motion for the Stay was denied. Plaintiff next appealed to the Supreme Court of New Jersey for a stay of the Order pending its appeal of the Director's findings and conclusions. The Supreme Court denied the stay.

In the meantime, on March 9, 1983, Plaintiff filed a suit with this Court, heard before the Honorable Judge Ackerman. Plaintiff brought suit against Defendant Vassallo and State Attorney General Kimmelman, requesting a declaratory judgment and other relief. Plaintiff charged that the regulation infringes on the First Amendment's guarantee of freedom of expression and violates the Fourteenth and Twenty-first Amendments to the United States Constitution. Plaintiff further charged that the regulation was unconstitutionally vague, and an unreasonable

exercise of police power. Plaintiff alleged that Defendants violated 42 U.S.C. §1983 by depriving him of rights guaranteed by the First, Fourteenth and Twenty first Amendments as well as the Commerce Clause. Plaintiff requested a Temporary Restraining Order and a Preliminary and Permanent Injunction to restrain the enforcement of the Order or future action by the state with regard to nude dancing at the Go Go Rama, and a declaration that the regulation is unconstitutional. Plaintiff requested costs and attorney's fees.

Judge Ackerman denied Plaintiff's applications for a temporary restraining order and a preliminary injunction, and abstained from jurisdiction over the complaint pursuant to *Younger v. Harris*, 401 U.S. 37, and *Huffman v. Pursue, Ltd.*, 420 U.S. 592. The Court retained jurisdiction over Plaintiff's requests for costs and attorney's fees under 42 U.S.C.A. §1988. That action was stayed, however, pending disposition of Plaintiff's claims in state court.

Plaintiff appealed Judge Ackerman's decision to the Third Circuit Court of Appeals, arguing that the regulation is unconstitutional for all of the same reasons argued in state and federal court. The Third Circuit denied Plaintiff's request to stay enforcement of the Order and future disciplinary actions under the regulation, but allowed an appeal of Judge Ackerman's dismissal provided Plaintiff confirm his intent to appeal by April 18, 1983. Plaintiff did not do so.

Despite the suit in state court and the decision of Judge Ackerman of this Court, Plaintiff filed the present action on August 2, of this year. This complaint again charges Defendant (absent Attorney General Kimmelman) with violations of the 1st, 14th and 21st Amendments, and 42 U.S.C. §1983. Plaintiff asks

for the identical relief as in the prior District Court suit, except that he has added a request for compensatory damages.

Shortly after filing this suit, on August 5, 1983, the Superior Court of New Jersey Appellate Division dismissed plaintiff's state court suit with prejudice for failure to prosecute. On September 6, 1983, Judge Ackerman ordered a dismissal of the case before him without prejudice.

Plaintiff was charged with further violations of the regulation in December of 1982 and January of 1983. On May 24, 1983, Defendant entered a second disciplinary order against Plaintiff stating that Plaintiff pled guilty to the charges against him, and imposing a 90-day suspension of Plaintiff's liquor license to run concurrently with the 60-day suspension. Although not stated in the order itself, Defendant states an Affidavit that this 90-day suspension was the result of a settlement which included a promise from Plaintiff agreeing not to bring future Court proceedings concerning those claims and issues that were the subject of the state court suit, the case before Judge Ackerman, and indeed, this suit. Presumably, this agreement served as the basis of the dismissal of the Ackerman suit and the failure to prosecute the state court suit.

At the time the current complaint was filed, Plaintiff applied for a Temporary Restraining Order. The Court ordered Defendant to show cause why a Preliminary Injunction should not issue enjoining Defendant from enforcing the regulation against Plaintiff. That is the subject of today's hearing. In addition, Defendant has filed a cross-motion to dismiss or consolidate the complaint with 83-838.

Opinion

Defendant's motion to consolidate this action with Civil Action 83-838, Judge Ackerman's case, is moot. As mentioned, Plaintiff's complaint in that case has been dismissed.

With regard to the motion to dismiss plaintiff's complaint and application before this court is nearly identical to that brought before Judge Ackerman. Frankly, no new issues are raised by it. Plaintiff does make a new request for relief, asking for compensatory damages, however. Except for the §1983 claim, it is identical to that brought in the state court also. Defendant asks that this complaint be dismissed as precluded by the doctrine of res judicata. In response, Plaintiff says that the §1983 cause of action has never been adjudicated on the merits.

A final judgment on the merits of an action will preclude the parties from re-litigating the issues that could have been raised in that action. Similarly, when a court decides an issue of law or fact necessary to its judgment, the parties are precluded from relitigating those issues and facts in a different cause of action. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

The court first finds that Judge Ackerman's decision of March 11, 1983, does not preclude jurisdiction in this matter. Judge Ackerman abstained from adjudicating the merits of the constitutional claims since there was a pending state court case. There was therefore no final judgment on the merits.

Whether the state court adjudications should be given preclusive effect is a difficult question. 28 U.S.C. §1738 requires that federal courts give preclusive effect to state court judgments when the state court itself would do so. *Allen v. McCurry*, 449 U.S. 90 (1980). When there was a full and fair opportunity to litigate the underlying Constitutional issues in state court, and

a §1983 action is brought in federal court for compensatory or other damages based on these Constitutional violations, the state court's judgment as to the Constitutional issues is binding upon the federal court. *Id.* "In our system of jurisdiction, Prudence, the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum." *Kremer, supra,* at p. 485.

Since no new issues or facts are raised in the present action which were not raised in the state court actions, the court is left with the question of whether Plaintiff had a full and fair opportunity to litigate the Constitutional issues in the state court, and whether there was a final decision on the merits. The merits of each constitutional issue raised in this suit to serve as the basis of the §1983 claim were decided by the Administrative Law Judge's opinion, and confirmed by the Agency's opinion. Plaintiff apparently contends that the agency decision is inadequate to constitute a final decision on the merits.

The Supreme Court has stated clearly that a judicial affirmance of an administrative decision is entitled to preclusive effect. *Kremer, supra.* The Court has also stated that "state proceedings need do no more than satisfy the minimum procedural requirements of the 14th Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Id.*, at page 481. *See also CIBA Corp. v. Weinberger*, 412 U.S. 640 at 644 (1973) ("[P]etitioner, having an opportunity to litigate the 'new drug' issue before the Food and Drug Administration and to raise the issue on appeal. . .may not relitigate the issue in another proceeding. [cites omitted.]")

In the instant case, the Administrative Law Office's proceeding did provide Plaintiff with a full and fair opportunity

to litigate the Constitutional issues consistent with due process. Plaintiff did not pursue his appeal through the state courts, however, to get a judicial affirmance of the administrative hearing. According to the complaint filed, he both bargained away these appeals in exchange for the 90-day suspension, and he felt they would be futile in light of the state courts' prior holdings in similar cases.

The question, then, is whether New Jersey courts would give the *unaffirmed* Director's decision preclusive effect. The New Jersey Supreme Court has stated that Alcoholic Beverage Control Board disciplinary hearings will be given preclusive effect in other agency hearings: "The doctrines of *res judicata* and collateral estoppel would generally attach to findings in [liquor license suspension and revocation hearings] since the sound reasons underlying the proper use of the doctrines in the courts would be fully applicable. [Cites omitted.]" *Lubliner v. Board of Alcoholic Beverage Control*, 33 N.J. 428 (1960).

The policies generally supporting preclusion are fully applicable in this case. The right of defendants to avoid duplicative actions, the need for courts to conserve judicial resources, the desire to avoid inconsistent decisions interpreting state law, and the desire to allow litigants to rely on the finality of adjudications are all relevant in this action. Still, it is not clear that New Jersey law would give preclusive effect to the agency's *unaffirmed* legal conclusions in subsequent court actions.

There is authority for Defendant's argument that Plaintiff's failure to prosecute the state court appeal of the Director's decision should give it preclusive effect in the federal court.

Since it is not clear that the New Jersey courts would grant preclusive effect to the unaffirmed decision of the Director in

a subsequent court action, and since the effect of res judicata or collateral estoppel is so harsh, the Defendant's motion to dismiss will be denied on this ground. This is done with hesitancy, however, given that Plaintiff's numerous attempts to litigate these identical issues have failed to reach the merits due in substantial part to Plaintiff's own decisions not to pursue his state court remedies. However, defendant's motion to dismiss for failure to state a claim upon which relief must be granted must also be considered.

In order to make out a claim under 42 U.S.C. §1983, plaintiff must show that action was taken under the color of state law which deprived him of a right, privilege or immunity secured by the Constitution.

Plaintiff alleges that the Defendant denied his First Amendment rights to freedom of expression, and his Fourteenth Amendment rights to due process of the law because the regulation is an unreasonable exercise of police power. Plaintiff also makes a vague claim that the regulation violates the 21st amendment, because the regulation does not adhere to the New Jersey state constitution. These constitutional deprivations are the bases of Plaintiff's §1983 claim.

§1983 is designed to protect against violations of the United States Constitution. Plaintiff's allegations that the regulation is inconsistent with the New Jersey constitution does not state a claim under §1983.

In fact, the 21st Amendment gives the states very broad powers to regulate the circumstances and situations under which liquor may be sold. The 21st Amendment gives states the power to prohibit the sale of liquor entirely, as well as to enact broad regulations, including the banning of topless dancing, to regulate the sale of liquor. *New York State Liquor Authority v. Bellanca,* 452 U.S. 714 (1981).

Opinion

With regard to the First Amendment claims, plaintiff claims that the regulation impermissibly infringes on the constitutionally protected right to nude dancing. In *California v. LaRue,* 409 U.S. 109 (1972), the Supreme Court recognized that the State's interests under the 21st Amendment question of freedom of expression in a different light. There, the Supreme Court upheld State regulations prohibiting sexual entertainment in licensed establishments. While the Court would not say that the state's powers under the 21st amendment "superseeded" first amendment rights, the court stated that "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment." *Id.* at 116. Specifically, the Court held that the state agency regulating the sale of liquor was not "limited to. . . dealing with the problem it confronted within the limits of our decisions as to obscenity." *Id.* at 116. While the Court recognized that the state regulation might prohibit some performances normally within the bounds of constitutional protection, in light of the state's 21st Amendment powers, the court would not invalidate the statute on its face. Inasmuch as the regulation was not irrational, it was upheld.

Similarly, the more recent case of *N.Y. State Liquor Authority v. Bellanca, supra,* reinforced the breadth of the state's powers under the 21st Amendment. There, the Court upheld a prohibition of topless dancing in licensed premises. The Court noted that "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs. . . .Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the 21st amendment." *Id.* at 717-718.

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The state's power to regulate the sale of liquor is broad enough to include the regulation of lewd behavior in licensed establishments. Therefore, Plaintiff has failed to state a constitutional deprivation under the First Amendment.

With regard to the Fourteenth Amendment, plaintiff claims that the regulation is an unreasonable exercise of the police power bearing no real or substantial relation to a legitimate governmental purpose, and therefore violates the due process clause of the 14th Amendment.

It is clear from the discussion of the state's rights and interests under the 21st amendment that the regulation of the sale of alcohol is indeed a legitimate governmental purpose. Plaintiff argues in his brief that a legislative determination of harm is necessary to provide a basis for the regulation. This notion was specifically rejected by the Supreme Court in *Bellanca*.

Furthermore, the Supreme Court has stated that, "While the states, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the 21st Amendment has been recognized as conferring something more than the normal state authority over Public Welfare, and Morals." *La Rue, supra,* at 114.

The regulation, which relates only to licensed premises, bears a rational to the protection of public welfare and morals. It does not on this basis violate the Fourteenth Amendment.

We also note that the regulation does not violate the Fourteenth Amendment by depriving plaintiff of property. The

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New Jersey courts have held that a liquor license if not a contract or property right. *Massa v. Cavicchia*, 5 N.J. 498 (1954).

The Court finds that Plaintiff has failed to plead an unconstitutional deprivation, and has therefore failed to state a claim upon which relief may be granted. Defendant's Motion to Dismiss the Complaint is granted. Plaintiff's Application for a Preliminary Injunction is on this basis moot.